

1 motion finding that a term of imprisonment of 240 months was reasonable in light of all the facts
2 and the relevant 18 U.S.C. §3553(a) factors.

3 Petitioner's 2255 Motion, which was filed May 10, 2010, sets forth two grounds for
4 relief. The first is that reconsideration of his sentence is warranted under Kimbrough v. United
5 States, 552 U.S. 85 (2007), which held that a sentencing court does not abuse its discretion if it
6 imposes a sentence less than the sentence recommended by the Sentencing Guidelines where the
7 court finds the 100 to 1 crack-to-powder cocaine sentencing disparity results in a sentence that is
8 greater than necessary to accomplish the sentencing goals set forth in 18 U.S.C. § 3553(a). Id. at
9 110 - 111. Second, Petitioner's 2255 Motion alleges that Petitioner suffered ineffective
10 assistance of counsel when his attorney failed to argue for a downward departure under 18 U.S.C.
11 § 3553(a) for "lesser harm" and "mitigating role."

12 Petitioner's first ground for relief was given full consideration in the course of
13 proceedings related to Petitioner's motion for reduction of sentence pursuant to 18 U.S.C. §
14 3582(c)(2). Petitioner's arguments regarding the court's discretion under Kimbrough were
15 thoroughly briefed by Petitioner's counsel and were squarely before the court at the time of the
16 hearing on February 7, 2011. In giving full consideration to Petitioner's arguments at the
17 hearing, the court has granted Petitioner all the relief to which he is entitled. Having denied
18 Petitioner's motion for reduction of his sentence on grounds identical to those supporting his
19 motion of August 10, 2009, the court has given consideration to and rejected Petitioner's first
20 ground for habeas relief. No further consideration of Petitioner's contentions regarding any
21 powder/crack cocaine sentencing disparity is warranted.

22 The second ground for habeas relief set forth in Petitioner's 2255 Motion is the allegation
23 he suffered ineffective assistance of counsel when his attorney failed to argue that consideration
24 of the factors set forth in 18 U.S.C. § 3553(a) warranted a lesser sentence. In particular,
25 Petitioner contends that his attorney should have argued for a lesser sentence under U.S.S.G. §
26 5K2.11 (lesser harm), and § 3B1.2 ((mitigating role). To establish a constitutional violation for
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1 the ineffective assistance of counsel, a defendant must demonstrate (1) a deficient performance
2 by counsel, and (2) prejudice to him. United States v. Cochrane, 985 F.2d 1027, 1030 (9th
3 Cir.1993). The record of the resentencing hearing held on February 7, 2011, indicates that the
4 court gave full consideration to the factors under section 3553(a) and reached a sentencing
5 conclusion based on all relevant facts. Petitioner's contentions with regard to lesser harm and
6 mitigating role are nonsensical under the facts of this case.

7 United States Sentencing Guideline section 5K2.11 expresses the policy that recognizes
8 that "a defendant may commit a crime in order to avoid a perceived greater harm. In such
9 instances, a reduced sentence may be appropriate, provided that the circumstances significantly
10 diminish society's interest in punishing the conduct [. . .]" Id. Petitioner argues that his attorney
11 provided ineffective assistance because there was no argument that Petitioner's actions were
12 pursuant to Petitioner's "gang related activities" and were "encouraged by shot callers" in the
13 organization for its economic gain. The court cannot conceive of any sense in which Petitioner's
14 gang-related activities could be said to diminish society's interest in punishing the unlawful
15 conduct. If anything, membership in, and conduct in furtherance of, a criminal street gang
16 indicates greater rather than lesser culpability. Pursuant to section 5K2.18, membership and
17 participation in the activities of a criminal street gang may warrant enhanced, not reduced
18 sentences. The court finds no merit in Petitioner's "lesser harm" argument.

19 Similarly, there is no factual basis for Petitioner's contention that his attorney provided
20 ineffective assistance by failing to investigate or argue for a mitigating role under USSG § 3B1.2.
21 Basically, Petitioner's core contention in this regard is that he was acting under the direction of
22 others when he procured and sold the cocaine to undercover police officer. The commentary to
23 section 3B1.2 indicates that a mitigating role adjustment may be appropriate where the defendant
24 is "substantially less culpable than the average participant." Petitioner was the sole defendant in
25 this case and did not identify other gang members who "directed" his activities. Petitioner was
26 convicted only of the sale of the amount of cocaine he actually sold and he admitted to all the
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1 conduct for which he was convicted. There is no basis for the contention that Petitioner is
2 somehow less culpable than any other defendant would be for the same conduct. The fact that
3 others may have been directing or encouraging Petitioner does not diminish Petitioner's
4 culpability; particularly in view of Petitioner's refusal to identify any other participants or to
5 identify what others did that would make Petitioner's activities significantly less culpable.
6 Because Petitioner has not alleged any facts that, if proven true, would entitle him to a lesser
7 sentence based on a minor or mitigating role, the court finds Petitioner's contentions with regard
8 to mitigating role to be completely without merit.

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10 THEREFORE, based on the foregoing analysis, the court finds that the resentencing
11 hearing conducted on February 7, 2011, provided Petitioner with all the relief to which Petitioner
12 is entitled. The court further finds that the conclusions reached in that hearing are conclusive of
13 the claims alleged by Petitioner in his 2255 Motion filed May 10, 2010. Petitioner's 2255
14 Motion is therefore hereby DENIED. The Clerk of the Court shall CLOSE the CASE.

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16 IT IS SO ORDERED.

17 Dated: February 15, 2011

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CHIEF UNITED STATES DISTRICT JUDGE